United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2121

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DONALD FRANKOS,

Plaintiff-Appellant,

-against-

J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility; J. CZARNETSKY, Deputy Warden of Clinton Correctional Facility; ARA ASADOURIAN, District Attorney of Clinton County; ROBERT P. WYLIE, Attorney-at-Law,

Defendants-Appellees.

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BRIEF FOR APPELLEES LaVALLEE, CZARNETSKY AND ASADOURIAN

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BRIEF FOR APPELLEES LaVALLEE, CZARNETSKY AND ASADOURIAN

Statement

This is an appeal from an order of the United States District Court for the Northern District of New York (Foley, J.) dated June 24, 1975 dismissing plaintiff's complaint pursuant to 42 U.S.C. § 1983 for failure to state a claim upon which relief can be granted.

Questions Presented

1. Did the District Court correctly hold that to determine appellant's allegations would result in the unauthorized interference of the State's criminal prosecution of appellant?

2. Does appellant allege the denial of any constitutional right?

Facts and Prior Proceedings

In his appellate brief,* the appellant alleges that he was denied the assistance of a fellow inmate, Jerome Rosenberg, the inmate who prepared his appellate brief, and of Dennis Cunningham, an attorney sent for by Rosenberg. He allegedly was denied their assistance at a Superintendent's proceeding and while he was in segregated confinement.

Appellant also alleges that Robert P. Wylie, counsel, who allegedly was assigned for him by the District Attorney and the Superintendent of the Correctional Facility where appellant is incarcerated, misrepresented to him his right to appear before the grand jury.

* Defendants-appellees were never served with summonses below. Appellant did not include a copy of his complaint in the appendix, and the writer of this brief was unable to locate the complaint in the Clerk's office of this Court. Thus, the allegations are derived from appellant's brief.

It is also alleged that Mr. Wylie was appointed by the District Attorney and Superintendent solely to prevent appellant's access to Messrs. Rosenberg and Cunningham; that he was deprived counsel while "in solitary on a serious charge." That Mr. Cunningham was refused permission to see appellant "who was retained to be counsel for plaintiff", and that he was denied access to the Courts by allegedly devious methods, presumably an allusion to the supposed "scheme" to appoint Mr. Wylie.

Appellant states that he was indicted for second degree murder by the Clinton County Grand Jury on December 3, 1974 (Appellant's Brief, p. 5).

According to the District Court, the complaint was filed May 9, 1975. The District Court dismissed the complaint on the ground that since a criminal prosecution is pending against the appellant in the state court,

> "[t]o determine that plaintiff has been deprived of his constitutional rights in the situation as it presently exists would be the unauthorized interference by this Court with a criminal prosecution in the State Courts over which this Court lacks jurisdiction. At the highest level there has been proclaimed a fundamental policy against federal interference with state criminal prosecution, and that policy has been recently reaffirmed by Kugler v. Helfant, ___ U.S. ___, [43 U.S.L.W. 4487], 4/29/75, referring to Younger v. Harris, 401 U.S. 37 (1971) and its companion cases."

The District Court also found, from letters* attached to the complaint, that "Attorney Robert P. Wylie was appointed for Frankos by the State Court in which the criminal prosecution was pending."

Appellant's trial is now scheduled for November 12, 1975.

POINT I

THE DISTRICT COURT CORRECTLY HELD THAT TO DETERMINE APPELLANT'S ALLEGATIONS WOULD RESULT IN THE UNAUTHORIZED INTERFERENCE OF THE STATE'S CRIMINAL PROSECUTION OF APPELLANT.

Appellant's allegations essentially involve his relationship with Robert P. Wylie, who, the District Court found, was appointed by the State Court to represent appellant in the criminal charges pending against him in State Court. He also alleges that he was deprived of his right to confer with Messrs. Rosenberg, his fellow inmate and "counsel" in this action, and Dennis Cunningham, for whom, Rosenberg states, he, Rosenberg, sent (appellant's brief, p. 4) at various times before being placed in segregated confinement and while in segregated confinement preparing for his trial.

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* This letter and those cited as Exhibits A, B, and C to appellant's brief (see brief, p. 5) were not provided in the copy of the brief sent to the Attorney General. The writer of this brief was unsuccessful in his attempt to locate them at the Clerk's office of this Court.

The facts alleged in appellant's brief do not demonstrate that the determination of the District Court that "what [he] is really complaining about is that he is dissatisfied with the manner in which Wylie has been conducting his defense" is clearly erroneous.

This Court has recently determined in Bedrosian v. Mintz, 518 F. 2d 396 (2d Cir., 1975) that the federal court's entertaining questions about the appointment of counsel in state criminal prosecutions would disrupt the state criminal proceedings and would conflict with the principles of equitable restraint and comity established in Younger v. Harris, 401 U.S. 37 (1971) and its companion cases.

The Supreme Court, in Younger v. Harris, supra, and most recently in Kugler v. Helfant, ____U.S.____, 43 U.S. L.W. 4487 (April 28, 1975) held that the federal courts should not intervene in pending state criminal prosecution by injunctive or declaratory relief absent great and immediate irreparable injury. To intervene, the prosecution must be guilty of bringing the prosecution without a reasonable expectation of obtaining a valid conviction. Notwithstanding the fact that Helfant alleged that the New Jersey judiciary was so personally involved in his case that it was impossible for him to receive a fair trial, the Court held that the federal courts should not intervene.

Appellant argues that his case is not covered by the proscription of Younger because the acts complained of occurred prior to indictment. The relevant dates, however, are the filing of the complaint in the federal court and the beginning of the state prosecution. Where the state indictment has been brought prior to the filing of the federal complaint, as here, the federal court should not intervene in the state prosecution. Younger v. Harris, supra; Samuels v. Mackell, 401 U.S. 66 (1971); see Steffel v. Thompson, 415 U.S. 452 (1974).

If a federal court were to inquire into appellant's relationship with the Court assigned attorney, Robert Wylie*, and with appellant's alleged inability to communicate with counsel while preparing for trial while in segregated confinement**, the federal court could not avoid intruding into the State prosecution. Its rulings could very well affect or even be binding on the course of the state proceedings. It is such interference that the principles of Younger v. Harris, supra and its progency forbid. If Appellant has been denied legal assistance in preparation for his trial or in any stage leading to trial, he will be able to bring the matter before the state court.

* The writer of this brief was informed by the Office of the District Attorney, Clinton County, that appellant is no longer represented by Mr. Wylie, and has had two attorneys subsequent to Mr. Wylie.

** Mr. Rosenberg state that he "sent for" Mr. Cunningham (appellant's brief, p. 4) so admittedly, appellant himself did not retain Cunningham.

POINT II

APPELLANT HAS NOT ALLEGED THE DENIAL OF ANY CONSTITUTIONAL RIGHT.

Appellant alleges no set of facts that, even if true, reach the level of constitutional deprivation. This Court stated in Bedrosian v. Mintz, supra, that the choice of assigned counsel is for the trial court, not the accused. See United States v. Tortura, 464 F. 2d 1202, 1210 (2d Cir.) cert. denied 409 U.S. 1063 (1972). Appellant did not have the right to have Mr. Cunningham represent him when, as the District Court found, Mr. Wylie had been appointed for him. In any event, appellant never states that he requested Mr. Cunningham's counsel. Jerome Rosenberg stated that he requested Mr. Cunningham see appellant (appellant's brief, p. 4).

Appellant's claim that he was denied the assistance of Messrs. Rosenberg and Cunningham at the Superintendent's proceeding is without merit. No such right exists. In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court stated, with respect to aid at a disciplinary hearing (418 U.S. at 510):

> "[the inmate] should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the from of help from the staff or from a sufficiently competent inmate designated by the staff." (emphasis supplied).

The inmate has no right to retain or appointed counsel, nor to assistance of a fellow inmate at a disciplinary proceeding. Wolff v. McDonnell, supra, 418 U.S at 569-70.

New York State Department of Correctional Services regulations for disciplinary proceedings, commended as "thorough, specific and sensitive" by this Court in Haymes v. Montayne, 505 F. 2d 977, 981 (2d Cir., 1974) app. pending, provides in 7 NYCRR § 253.3(a) that an employee of the Department be appointed to assist an inmate at a Superintendent's proceedings.

Appellant's right to have legal papers prepared for him by another inmate guaranteed by Johnson v. Avery, 393 U.S. 483 (1969), Younger v. Gilmore, 404 U.S. 15 (1971) affg. 319 F. Supp. 105 (N.D. Cal 1970) and Wolff v. McDonnell, has obviously not been deprived as the Court may notice from the existance of appellant's brief in this action.

Appellant has not demonstrated that the finding of the Court below that Mr. Wylie was appointed by the trial court and not as a result of a conspiracy of Messrs. Asadourian and LaVallee was ere clearly erroneous. It is a mere conclusion not supported by any evidentiary facts, required of even a pro se litigant. Morgan v. LaVallee, ____F. 2d____, Slip op. No. 70, p. 191 (2d Cir., October 14, 1975); Powell v. Workmen's Compensation Board of the State of New York, 327 F. 2d 131, 137 (2d Cir., 1964).

Appellant's allegations, even if true, do not allege a deprivation of any constitutional right.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
October 31, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
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State of New York
Attorney for defendants-appellees
LaVallee, Czarnetsky, and
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SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID L. BIRCH
Deputy Assistant Attorney General
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MAGDALINE SWEENEY , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney fordefendants-appellees LaVallee, Czarnetsky and Asadurian herein. On the 31st day of October , 1975 , she served the annexed upon the following named person :

Donald Frankos
Bos B
Dannemora, New York 12929

Jerome Rosenberg
Box B
Dannemora, New York 12929

Parties
~~Attorney~~ in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said ~~Attorney~~ Parties at the address eswithin the State designated by them for that purpose.

Magdaline Sweeney

Sworn to before me this
30th day of October , 197

David J Bril

Assistant Attorney General
of the State of New York